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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

LEONARD DE LUE, D. J. SEBERN, T. W. RINKER, and TED P. RINKER, d/b/a ARMORED MOTORS SERVICE; and THE CONTRACT CARRIERS CONFERENCE OF THE COLORADO MOTOR CARRIERS ASSOCIATION,

Petitioners,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; JOHN JOSEPH PERRY and PAUL K. DI ANDREA, d/b/a PERRY TRANSFER COMPANY; and B.D.C. CORPORATION OF COLORADO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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NO. _____

IN THE SUPREME COURT OF THE
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LEONARD DE LUE, D. J. SEBERN, T. W. RINKER, and TED P. RINKER, d/b/a ARMORED MOTORS SERVICE; and THE CONTRACT CARRIERS CONFERENCE OF THE COLORADO MOTOR CARRIERS ASSOCIATION,

Petitioners,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; JOHN JOSEPH PERRY and PAUL K. DIANDREA, d/b/a PERRY TRANSFER COMPANY; and B.D.C. CORPORATION OF COLORADO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF COLORADO

I

INTRODUCTION

Petitioners respectfully pray that a Writ of Certiorari issue to review the Opinion and

Judgment of the Supreme Court of the State of Colorado entered in the above entitled case on May 26, 1969, and the further Judgment entered by that Court on June 9, 1969, denying rehearing.

II

REFERENCE TO OPINIONS BELOW

The unreported opinion of the Public Utilities Commission of the State of Colorado was entered on June 27, 1967 (R. p. 228), and is attached hereto as Appendix A-1. The unreported decision of the Denver (Colorado) District Court was entered on June 5, 1968, generally affirmed the aforementioned Commission decision, and it is attached hereto as Appendix A-2. The decision of the Supreme Court of the State of Colorado was entered on May 26, 1969 (R. p. 55), is reported at 454 P.2d 939, and is attached hereto as Appendix A-3. Petition for Rehearing was filed (R. p. 66), and said Court denied such Petition on June 9, 1969 (R. p. 71).

III

GROUNDS ON WHICH JURISDICTION IS INVOLVED

The opinion and judgment of the Supreme Court of the State of Colorado sought to be reviewed was entered on May 26, 1969 (Appendix A-3, infra). Rehearing was denied on June 9, 1969 (Appendix A-4, infra).

The jurisdiction on this Court is invoked under 28 U. S. C., Section 1257 (3).

IV

QUESTION PRESENTED FOR REVIEW

Can the Public Utilities Commission of the State of Colorado constitutionally deny motor vehicle carriers holding valid private (contract) carrier permits from the State of Colorado the right to appear and be heard with respect to the transfer of a common carrier certificate, which certificate directly conflicts with the authority held by such private carriers, where they would be affected by such transfer.

V

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Statutory provisions involved are 1963 Colorado Revised Statutes 3-16-3(1) and 3-16-5(3), being portions of the State Administrative Code, and 115-6-9, being a portion of the State Public Utilities Law. Relevant portions of these statutes are printed in Appendix B-2. Constitutional provisions involved are Article II, Section 25 of the Colorado Constitution and the 14th Amendment to the United States Constitution, both generally containing "due process" clauses. These provisions are printed in Appendices B-3 and B-4.

VI

STATEMENT OF THE CASE

On March 1, 1967, John Joseph Perry and Paul K. DiAndrea, d/b/a Perry Transfer

Company (hereinafter referred to as Perry Transfer Company), as Transferors, and B. D. C. Corporation of Colorado (hereinafter referred to as B. D. C.), as Transferee, filed a joint application seeking authority from the Public Utilities Commission of the State of Colorado for the transfer of Certificate of Public Convenience and Necessity PUC No. 3800 and PUC 3800-I from Perry Transfer Company to B. D. C. (R. p. 118). On April 6, 1967, a joint petition for leave to intervene as a protestant was filed by Armored Motors Service (R. p. 136). On April 12, 1967, the Commission granted said petition to intervene (R. p. 142). On April 14, 1967, Perry Transfer Company filed a motion to strike the protest and intervention of Armored Motors Service (R. p. 144), which motion was received by the Commission the day of the hearing. On April 17, 1967, The Contract Carriers Conference of the Colorado Motor Carriers Association (hereinafter referred to as the Conference), also filed a Petition to Intervene (R. p. 146), which motion was resisted by Perry Transfer Company and B. D. C. (R. p. 7). The Commission took both motions under advisement and in its decision of June 27, 1967, denied both Armored Motors Service and the Conference the right to intervene, generally holding (Appendix A-1) that:

> "A (contract) private carrier by motor vehicle may not intervene as a matter of right in an application before the Commission, made by others, seeking authority to transfer (common) motor vehicle carrier operating rights."

* * * * *

"An association of (contract) private carriers by motor vehicle (Contract Carriers Conference of the Colorado Motor Carriers Association) stands basically in the same position as its members and cannot intervene as a matter of right in the above-designated proceedings."

This decision was affirmed by the Denver District Court upon a petition for certiorari and review (Appendix A-2) and also affirmed by the Supreme Court of the State of Colorado (Appendix A-3).

VII

REASONS FOR GRANTING WRIT OF CERTIORARI

As indicated in the Statement of the Case, the Commission concluded that Armored, a private carrier, had no right to appear in the instant proceeding wherein Perry sought authority to transfer its common carrier certificate to B. D. C., and that Armored had not shown a sufficient interest in the proceeding to warrant being allowed to intervene. The same basic ruling was also made with respect to the Conference. In doing so, the Colorado Supreme Court decided what we believe to be a federal question of substance not previously decided by this Court and by analogy at variance with applicable decisions of this Court. Specifically, substantive statutory and Constitutional rights of Petitioners and a large segment of the motor carrier industry in Colorado have

been adversely affected by the instant decision of the Colorado Supreme Court.

In answering the basic issue in this proceeding, we would refer the Court to Professor Kenneth Culp Davis' "Administrative Law Treatise," 1958 edition, wherein he makes the following pertinent comments:

> "We think it clear that any person who would be 'aggrieved' by the Commission's order, such as a competitor, is also a person who has a right to intervene." (Emphasis added)
>
> ". . . The cases now make clear that one whose only interest in an application case is that of a competitor who will be affected by economic competition is entitled to intervene and to have full rights of a party. The Sanders case (F.C.C. v. Sanders Bros., 309 U.S. 470, 60 S. Ct. 693, 84 L. Ed. 869, 1940), had early held that such a competitor has standing to obtain judicial review." (Sec. 8.11, p. 569)
>
> * * * * *
>
> "The Sanders doctrine as further developed in the Scripps-Howard and KOA cases (F.C.C. v. N.B.C., 319 U.S. 239, 63 S. Ct. 1035, 87 L. Ed. 1374, 1943) is of primary importance to the law of standing, for the Supreme Court in the three cases has enunciated the principle that one whose only interest in attacking the administrative action is to avoid a new or increased competition has standing to make the attack, even though it is specifically recognized that the attacker has no 'legal right' at stake.

"The practical effect of the (Sanders) doctrine is essentially sound; one who is in fact adversely affected should have standing to challenge the legality of administrative action. . ." (Sec. 22.04, p. 221)

The Administrative Code of the State of Colorado has two provisions which are pertinent, 1963 CRS 3-16-3(1) and 3-16-5(3). The first of these provides that:

". . . in any case in which application is made for a license required by law, the agency, with due regard for the rights and privileges of all interested parties, shall set and conduct the proceedings in accordance with this article unless otherwise required by law." (Emphasis added)

The second cited section provides that:

"A person adversely affected or aggrieved by any such reviewable agency action shall have standing to seek judicial review thereof." (Emphasis added)

The statutory basis in the Public Utilities Law for intervention before the Commission is found in 1963 CRS 115-6-9, which provides in pertinent part as follows:

"At the time fixed for any hearing before the commission . . ., the applicant, petitioner, complainant, the person, firm, or corporation complained of, such persons, firms, or corporations as the commission may allow to intervene and such persons, firms, or corporations as will be interested in or affected by any

order that may be made by the commission in such proceeding, shall be entitled to be heard, examine and cross-examine the witnesses, and introduce evidence." (Emphasis added)

The Commission's own Rules of Practice and Procedure Rule 7(a) provides as follows:

"At any hearing, all parties : . . who are directly affected by the proceeding, shall be entitled to enter an appearance, to introduce evidence, examine and cross-examine witnesses, make arguments, and generally participate in the conduct of the proceeding." (Emphasis added)

And Rule 9(e) provides as follows:

"Any person who may be affected by the granting of a certificate or permit to an applicant shall have the right to file his written protest (in duplicate) to the granting of such certificate or permit, or, in the discretion of the Commission be heard as a protestant without written pleadings." (Emphasis added)

Thus, the Commission's own rules recognize the basic concept that an affected party has the right to be heard.

In the case of Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (Ct. App. 2nd, 1965, cert. den., 384 U.S. 941), the Court quoted with approval from the dissenting opinion of one of the FPC Commissioners as follows:

"In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role

> does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive action and affirmative protection at the hands of the Commission . . . The Commission has an affirmative duty to inquire into and consider all relevant facts." (Emphasis added)

In the instant matter, the Commission and the Colorado Supreme Court have read into the statute a qualification not found there -- that any affected person, other than a private carrier, has standing to appear and be heard. In so doing we submit that the Commission and the Court have violated the rights of Petitioners under the due process clauses of both the United States Constitution and the Constitution of the State of Colorado.

The rationale of the Colorado Supreme Court's opinion is that a private carrier is not entitled to participate because he is not entitled to protection, but we submit that this should not destroy his right to participate as a party and to be heard where he is affected. In this regard the Court's attention is invited to Associated Industries v. Ickes, 134 F.2d 694 (2nd Cir., 1943), wherein it was held:

> ". . . one threatened with financial loss through increased competition resulting from a Commission's order is 'aggrieved,' and entitled as such to a review notwithstanding that the very statute pursuant to which he obtains review . . . confers upon him no property right which gives him any kind of immunity from competition."

To the same effect is the decision of this Court in F.C.C. v. N.B.C., supra.

We submit that it is clear from the foregoing that the decision of the Commission in the first instance, and the ultimate decision of the Colorado Supreme Court, violate the constitutional rights of these Petitioners to be heard in matters where they are affected, and that such decisions are not in accord with this Court's analagous rulings in F.C.C. v. Sanders Bros., supra, and in F.C.C. v. N.B.C., supra. In addition, the decisions are wholly at variance with the ruling of the Second Circuit in Scenic Hudson Preservation Conference v. F.P.C., supra, and violate the statutory rights of Petitioners as granted under the State Public Utility Law and the State Administrative Code, as above set forth.

VIII

WHEN AND HOW FEDERAL QUESTION WAS RAISED

The constitutional question of due process was first raised in the Petition for Rehearing and Reconsideration filed by the Conference with the Commission (R. p. 254), which Petition was denied by the Commission without comment on the constitutional issue (R. p. 265). The question was again raised in the Petition for Writ of Certiorari or Review filed by Petitioners with the Denver District Court (R. p. 6). The Judgment and Order of the Denver District Court expressly held that the decisions

of the Commission involved did not violate any right of the Petitioners either under the Constitution of the United States or the Constitution of the State of Colorado (R. pp. 51-52). Petitioners again raised the issue in their joint Motion for Rehearing or New Trial (R. p. 41), but this Motion was denied without further comment by the Court (R. p. 68). In their Briefs filed with the Colorado Supreme Court, Petitoners again asserted the due process argument, and the Colorado Supreme Court, in its Opinion of May 26, 1969, expressly rejected the constitutional contentions that had been made (R. p. 62), suggesting that Armored had no right to be free from competition (which was not, however, the real constitutional issue presented). Petition for Rehearing filed by the Conference again raised the constitutional question of due process (R. p. 67), but the Petition was denied without comment on the constitutional issue (R. p. 71).

IX

CONCLUSION

Petitioners submit that the Colorado Supreme Court and the Colorado Public Utilities Commission in refusing Armored Motors Service and the Conference the opportunity to participate in a proceeding where both would be affected, deprived such parties of property without due process of law and further deprived them of the equal protection of the law. For these reasons,

this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A-1

(Decision No. 69731)

BEFORE THE PUBLIC UTILITIES
COMMISSION OF THE
STATE OF COLORADO

* * *

IN THE MATTER OF THE APPLICATION OF JOHN JOSEPH PERRY AND PAUL K. DI ANDREA, CO-PARTNERS, DOING BUSINESS AS "PERRY TRANSFER COMPANY", 2660 WEST 40TH AVENUE, DENVER, COLORADO, FOR AUTHORITY TO TRANSFER PUC NO. 3800 AND PUC NO. 3800-I TO B.D.C. CORPORATION OF COLORADO, 420 DENVER CLUB BUILDING, DENVER, COLORADO.	APPLICATION NO. 22463-Transfer

June 27, 1967

Appearances:

Leslie R. Kehl, Esq., Denver, Colorado, for John Joseph Perry and Paul K. Di Andrea, the Transferors, and B.D.C. Corporation of Colorado, the Transferee;

Herbert M. Boyle, Esq., Denver, Colorado, for Armored Motor Service

and Speedy Messenger Service, Protestants;

Joseph F. Nigro, Esq., Denver, Colorado, for Package Delivery Service Company, Protestant;

John R. Barry, Esq., Denver, Colorado, for Denver-Colorado Springs-Pueblo Motorway, Continental Bus Systems, Inc. (Rocky Mountain Division), Denver-Salt Lake Pacific Stages, Inc., American Bus Lines, Inc., Central Bus Lines, Trans-Continental Bus Lines, and Continental Bus Lines, Protestants; and

John J. Conway, Esq., Denver, Colorado, for the Contract Carriers Conference of the Colorado Motor Carriers Association, Intervenors.

PROCEDURE AND RECORD

On March 1, 1967, John Joseph Perry and Paul K. Di Andrea, co-partners doing business as "Perry Transfer Company", as transferors, and B. D. C. Corporation of Colorado, as transferee, filed the instant joint application (No. 22463-Transfer) seeking authority from the Commission for the transfer of Certificates of Public Convenience and Necessity PUC No. 3800 and PUC No. 3800-I from John Joseph Perry and Paul K. Di Andrea to B. D. C. Corporation of Colorado.

On April 6, 1967, a joint protest to the transfer was filed by Denver-Colorado Springs-Pueblo Motorway, Continental Bus Systems, Inc. (Rocky Mountain Division), Denver-Salt

Lake Pacific Stages, Inc., American Bus Lines, Inc., Central Bus Lines, Transcontinental Bus Lines, and Continental Bus Lines. Also on April 6, 1967, a joint petition for Leave to Intervene as Protestants was filed by Leonard DeLue, D. J. Sebern, T. W. Rinker, and Ted P. Rinker, doing business as Armored Motors Service, and Bill Hubbard, doing business as "Speedy Messenger Service". On April 12, 1967, the Commission in Decision No. 69365 granted this petition to intervene. On April 10, 1967, a protest was filed by Package Delivery Service Company. On April 17, 1967, the Applicant Transferors and Transferee filed a joint motion to strike the Protest and Intervention of Armored Motor Service.

After due and proper notice to all interested parties, the application was heard by Commissioner Howard S. Bjelland at 10:00 o'clock A.M. on Monday, April 17, 1967, in the Hearing Room of the Commission, 532 State Services Building, 1525 Sherman Street, Denver, Colorado. Several preliminary matters were raised by counsel, which will now be set forth in chronological order.

Preliminary Matter No. 1: A petition to intervene was tendered to the Presiding Commissioner on behalf of the Contract Carriers Conference of the Colorado Motor Carriers Association. Applicants objected to such petition for intervention because (1) such petition was not timely filed and (2) the Association is neither carrier, shipper, nor other interested party. The petition to intervene and the objections thereto were both taken under

advisement by the Presiding Commissioner. The Contract Carriers Conference of the Colorado Motor Carriers Association was allowed to appear in the proceeding, subject to a ruling on the petition to intervene and objections thereto to be made in the final order of the Commission in the proceeding.

Preliminary Matter No. 2: On April 14, 1967, the Applicants mailed a "Motion To Strike The Protest And Intervention of Armored Motor Service", which motion was received by the Secretary of the Commission during the day of April 17, 1967, sometime after the instant cause was called for hearing. The written motion, as well as a similar oral motion was made by counsel, raises the issue of whether (1) the petition to intervene of Armored Motor Service was timely filed, and whether (2) a private carrier has a right to protest a common carrier application. The Presiding Commissioner took the motion to strike under consideration. Armored Motor Service was allowed to appear in the proceeding, subject to a ruling on the motion to strike to be made in the final order of the Commission in this proceeding.

Preliminary Matter No. 3: The Applicants orally moved to strike the appearance of the various bus lines represented by John R. Barry, Esq., for the reason that such bus companies "have no interest whatsoever in a transfer proceeding involving general commodities point to point within the City and County of Denver". This motion to strike was also taken under consideration by the Presiding Commissioner. The various bus lines were allowed to appear in the proceeding, subject to a ruling on the motion to

strike to be made in the final order of the Commission in this proceeding.

John Joseph Perry, one of the Applicant Transferors, and Larry Crutchfield, Vice-President of B. D. C. Corporation of Colorado, the Transferee, testified in support of the application. Applicants introduced in evidence the following exhibits:

A. A 4-page document entitled "Agreement of Sale" dated February 27, 1967, and executed by John Joseph Perry, Paul K. Di Andrea, and B. D. C. Corporation of Colorado.

B. A 1-page document entitled "B. D. C. Corporation of Colorado Balance Sheet As Of April 31, 1967."

C. A 7-page document entitled "Loan Commitment Agreement" dated June 20, 1966, and executed by Bankers Dispatch Corporation and B. D. C. Corporation of Colorado.

D. A 1-page document entitled "Amendment To Loan Commitment Agreement" dated April 13, 1967, and executed by Bankers Dispatch Corporation and B. D. C. Corporation of Colorado.

At the joint request of the Applicants, as well as Armored Motor Service, and Speedy Messenger Service, the Presiding Commissioner took official notice of a multi-paged document designated as "Colorado PUC No. 1, Metropolitan Movers and Transfers Conference, Local Cartage No. 1".

Upon conclusion of the case of the Applicants, a motion was made on behalf of Armored Motors Service and Speedy Messenger Service,

joined in by all other protestants and intervenors:

> "That the evidence as shown by bills of lading that have been identified here but not received in evidence as the type of operation engaged in by Mr. Perry, it was the testimony of Mr. Crutchfield that a broader operation would be engaged in if this were transferred to him, and we move that this application be dismissed on the grounds that there is no showing of a need for the broader application as testified to by Mr. Crutchfield".

The Presiding Commissioner took this motion under consideration.

Ted P. Rinker, a partner in Armored Motor Service, and William C. Hubbard, the owner of Speedy Messenger Service testified in protest to the application. Protestants introduced in evidence the following exhibits:

1. A 1-page document being the Letter of Authority issued by the Public Utilities Commission, dated February 20, 1967, to Perry Transfer Company under Permit No. B-6659.
2. A 1-page document being the Letter of Authority issued by the Public Utilities Commission, dated December 13, 1966, to Speedy Messenger Service under Certificate No. 2428.

The Presiding Commissioner took official notice of the Letter of Authority, dated January 18, 1967 (3-page), issued by the Public Utilities Commission to Package Delivery Service Co. under Certificate No. 572.

During the presentation of the case of Protestant Armored Motor Service, Applicants

objected on several occasions to the testimony of Ted P. Rinker on the basic ground that any testimony given on behalf of a private carrier in a proceeding involving the transfer of a common carrier certificate is irrelevant and immaterial. The Presiding Commissioner took these objections under consideration. In view of the Commission Order to follow striking the Protest and Intervention of Armored Motor Service, no ruling now appears to be necessary as to these objections.

The Commission now takes official notice, on its own motion, of Commission Decisions No. 47505, 66777, 66503, 68395, 44846, 39255, 46775, 66765, 69292, and 69520.

At the conclusion of the hearing the Presiding Commissioner directed that briefs be filed, and took the matter under advisement. The requested briefs have now been filed and the matter is before the Commission for determination.

FINDINGS OF FACT

After due and careful consideration of the entire record in this proceeding, the Commission finds as fact from such record that:

1. John Joseph Perry and Paul K. Di Andrea, partners doing business under the name of "Perry Transfer Company", are the owners and operators of Certificates of Public Convenience and Necessity No. 3800 and No. 3800-I issued and granted by the Public Utilities Commission.

2. Certificate No. 3800 authorizes the holder thereof to operate as a call and demand

motor vehicle carrier (common) for hire for the transportation of general commodities between points within the City and County of Denver, State of Colorado. This authority was originally granted by Decision No. 47505, dated March 11, 1957, was transferred to John Joseph Perry and Larry E. Trefry on December 23, 1965 in Decision No. 66503, and was transferred to John Joseph Perry and Paul K. Di Andrea on October 24, 1966 in Decision No. 68395.

3. Certificate No. 3800-I authorizes the holder thereof to exercise such interstate operating rights, as it may have, in the State of Colorado. This certificate is of no particular import in the instant proceeding. (For a full discussion of "I" authorities, see our Decision No. 66777, dated February 9, 1966.)

4. During the period of time that John Joseph Perry has been a part owner of Certificate No. 3800, refrigerators, stoves, ovens, television sets, washing machines, dryers, furniture of all varieties, household goods and accessories, kitchen cabinets, air conditioners, panels, hoods, electrical outlets, mechanical parts, furnaces, controls, copper tubing, carpeting, foam padding, dishes, towels, beds, box springs, toys, office equipment, desks, chairs, and other items have been transported under the authority of Certificate No. 3800. Perry Transfer Company has accepted all traffic tendered to it within the scope of Certificate No. 3800. Perry Transfer Company presently operates three pieces of equipment, namely, two one-half ton units and a one ton unit. Perry Transfer Company participates in Colo. P.U.C.

No. 1, Metropolitan Movers and Transfer Conference, Local Cartage Tariff No. 1. Certificate No. 3800 is in good standing before the Commission. Perry Transfer Company has, and now is, engaged in bona fide motor carrier operations under such operating rights.

5. B.D.C. Corporation of Colorado is a corporation duly organized and existing under the laws of the State of Colorado. On February 21, 1966, the Secretary of State of Colorado issued a Certificate of Incorporation to B.D.C. Corporation of Colorado. This corporation presently has no Colorado intrastate motor carrier operating authority. B.D.C. Corporation of Colorado is a wholly-owned subsidiary of Bankers Dispatch Corporation, a corporation duly organized and existing under the laws of the State of Delaware with its principal office at 4970 South Archer Avenue, Chicago, Illinois.

6. On February 27, 1967, John Joseph Perry and Paul K. Di Andrea entered into an agreement to sell, transfer, and convey Certificates of Public Convenience and Necessity No. 3800 and No. 3800-I to B.D.C. Corporation of Colorado for a sales price of $2,000.00, subject to the prior authorization and approval of the Public Utilities Commission. On March 1, 1967, John Joseph Perry, Paul K. Di Andrea, and B.D.C. Corporation of Colorado filed the instant joint application seeking authorization from the Commission to effectuate the proposed transfer.

7. B.D.C. Corporation of Colorado, as of April 1, 1967, had total assets in cash of $10,000. In addition to such cash assets,

B. D. C. Corporation of Colorado has a written commitment (Exhibits No. C & D) from its parent corporation, Bankers Dispatch Corporation, which will allow it to obtain an additional $50,000 on proper promissory note if such additional funds are needed for intrastate Colorado operation. The financial resources of B. D. C. Corporation of Colorado are adequate for the rendition of proper service under Certificate No. 3800.

8. If the transfer here under consideration should be approved by the Commission, B. D. C. Corporation of Colorado intends to immediately purchase two motor vehicle units. The first would be a one ton truck, and the second unit would be either a panel truck or a station wagon. Such corporation would also intend to lease office facilities, garage, and parking facilities in Denver. If the transfer is approved, B. D. C. Corporation of Colorado intends to immediately engage in bona fide motor carrier operations under Certificate No. 3800. The equipment and facilities which such corporation intends to acquire are adequate to institute the rendition of service.

9. B. D. C. Corporation of Colorado, through its corporate officers, is familiar with the rules and regulations of the Commission. Its corporate officers are also experienced in the conduct of motor carrier general commodity transportation services. It will have adequate experienced management in order to render a proper transportation service. B. D. C. Corporation of Colorado, as a corporation and through its corporate officers, is a fit and proper entity to render common carrier motor

vehicle transportation services in the State of Colorado.

10. Leonard DeLue, D. J. Sebern, T. W. Rinker and Ted P. Rinker are partners, doing business as "Armored Motors Service". Armored Motors Service is the owner and operator of Permit No. B-958 (also "I" authority) which generally authorizes the holder thereof to operate as a Class "B" Private Carrier by Motor Vehicle for the transportation of coin, currency, valuable papers, and other commodities normally transported by armored car throughout the entire State of Colorado. It maintains offices at Colorado Springs, Boulder, Denver, and Pueblo. Armored Motors Service has no (common) motor vehicle carrier authority. It does not render service to the general public. It renders armored car service under contract to such customers as it may wish to serve, and as may wish to enter into the requisite contract.

11. Bill Hubbard, an individual doing business as "Speedy Messenger Service", is the owner and operator of Certificate of Public Convenience and Necessity No. 2428 issued by this Commission. This certificate, as relevant in this proceeding, authorizes the holder thereof to operate as a (common) motor vehicle carrier for hire for the transportation of articles for pickup and delivery within the City and County of Denver, State of Colorado. Certificate No. 2428 is in good standing before the Commission, and "Speedy Messenger Service" is now presently engaged in rendering a bona fide motor carrier operation within the City and County of Denver under such certificate.

12. Package Delivery Service Company, a corporation, is the owner and operator of Certificate of Public Convenience and Necessity No. 572 issued by this Commission. This certificate, as relevant in this proceeding, authorizes the holder thereof to operate as a (common) motor vehicle carrier for hire for the transportation of general commodities from point to point within the City and County of Denver in the operation of a package delivery service. Certificate No. 572 is in good standing before the Commission, and Package Delivery Service Company is now presently engaged in rendering a bona fide motor carrier operation within the City and County of Denver under such certificate.

13. To a limited degree, the transportation services offered by Speedy Messenger Service and Package Delivery Service Company are competitive with the transportation services presently offered by Perry Transfer Company, and to be offered by B.D.C. Corporation of Colorado, if the transfer is approved. Such fact, in and of itself, does not constitute grounds for denying a transfer application.

14. Denver-Colorado Springs-Pueblo Motorway, Continental Bus Systems, Inc. (Rocky Mountain Division), Denver-Salt Lake Pacific Stages, Inc., American Bus Lines, Inc., Central Bus Lines, Transcontinental Bus Lines, and Continental Bus Lines are bus companies operating in the State of Colorado, all being part of the Continental bus system. No evidence of any kind was introduced which would indicate that the transfer here under consideration would have any effect on these bus companies.

15. The Colorado Motor Carriers' Association is a non-profit corporation, duly organized and existing under the laws of the State of Colorado. The Contract Carriers Conference of the Colorado Motor Carriers' Association is an association of contract (private) carriers operating within the general framework and as a part of the Colorado Motor Carriers' Association. Approximately 114 contract (private carrier by motor vehicle) carriers are members of this conference. No common (motor vehicle carrier) carriers are members of the Conference, and under the by-laws of the Conference, common carriers are not eligible for membership.

16. The proposed transfer is compatible with the public interest and should be authorized and approved.

DISCUSSION

The basic question raised by Preliminary Matter No. 1 and No. 2, as hereinbefore designated, is whether or not a private carrier by motor vehicle has a right to appear in protest to the transfer of a common carrier certificate.

The applicable statute is 1963 CRS 115-6-9, which, as relevant to the issue before us, reads as follows:

> "At the time fixed for any hearing before the Commission, ... the applicant, petitioner, complainant, the person, firm, or corporation complained of, such persons, firms, or corporations as the commission may allow to intervene, and such persons as will be interested in or

affected by any order that may be made by the commission in such proceeding, shall be entitled to be heard, examine and cross-examine the witnesses, and introduce evidence."

The statute appears to contemplate two types of intervenors, i.e., Intervenor By Permission ("such persons, firms, or corporations, as the commission may allow to intervene"), and Intervenor By Right (such persons as will be interested in or affected by any order that may be made by the commission in such proceeding).

Pursuant to such statutory provisions, Rule 7 (a) of the Rules of Practice and Procedure Before the Public Utilities Commission provides:

(a) Rights of Parties. At any hearing, all parties ..... who are directly affected by the proceeding, shall be entitled to enter an appearance, to introduce evidence, examine and cross-examine witnesses, make arguments, and generally participate in the conduct of the proceeding."

This rule obviously covers the Intervenors by Right. Rule 8 (a) and 8 (d) read as follows:

(a) When Leave to Intervene Necessary. Persons not directly affected by the proceeding shall secure an order from the Commission granting leave to intervene before being allowed to participate.

(d) When Petition May Be Granted. If an intervening petition shows substantial interest in the subject matter of the

> proceeding or any part thereof and does not unduly broaden the issues, the Commission or the hearing officer may grant the prayer for leave to intervene and thereupon the intervener shall become a party to the proceeding with respect to the matters set out in his intervening petition and may be subject to such reasonable conditions as may be prescribed.

These rules appear to cover the Intervenor by Permission.

The Commission has consistently held over a period of many years that a private carrier by motor vehicle has no standing to protest either the granting of common carrier authority or even additional private carrier by motor vehicle authority. In Decision No. 44846, dated November 1, 1955, the Commission said:

> "The offer of proof of Mr. A. E. Snyder concerning his existing service in the area was rejected, as Mr. Snyder is a private carrier and therefore not obligated to render any service at all. As the service he renders is rendered entirely at his discretion, and the public can get service from him only as he sees fit to give it, evidence as to the service he actually renders has little significance, for he can stop rendering it tomorrow. Evidence concerning the service he renders would not have the effect, therefore, of showing that this application should be denied."

The Commission did not conclude with the above language, but took a second occasion in this same opinion to call to the attention of the

private carrier that he was not entitled to an effective protest. This the Commission did by stating:

> "This is an appropriate occasion to make it clear to the private carrier, Mr. Snyder, that as he was a private carrier and thereby avoids the obligation to serve the public (except as his convenience and the rate situation may dictate), he is not entitled to the slightest protection from the encroachment of other carriers upon his operation. Any carrier which can show that additional service is wanted or needed, and that it is qualified financially and by experience to render the additional service is entitled to be authorized to do so, consistent only with due protection of the rights of common carriers serving the territory."

In Decision No. 32955, dated June 25, 1949, the Commission refused to allow one private carrier to protest the granting of additional authority to another private carrier, saying:

> "John Ballantine, of Pueblo, Colorado, holder of a private carrier authority, was called and testified. However, since he is a private carrier he is not allowed to protest under the law and his testimony has no probative value."

In Decision No. 46775, dated November 7, 1956, the Commission said:

> "True, he can serve Greeley as an intermediate point between Denver and Ault, Kersey or Nunn, but only under the A permits, and a permit holder cannot be heard to protest the granting of

private carrier authority or extension thereof such as is involved in this case. It would appear that he is attempting to protect his operations under his private carrier permits by protesting as a common carrier, without justification save in the operations proposed in Adams County and his testimony can be accepted as a valid protest only as to the proposed application of Burbridge to extend service into that County."

In Decision No. 66765, dated February 8, 1966, the Commission confirmed a ruling of a Hearing Examiner, after stating:

"Report of the Examiner states that at the hearing John H. Lewis, attorney for Applicant, stated a Motion had been filed to strike the written protest filed on behalf of C. B. Johnson, Inc., on the grounds that C. B. Johnson, Inc. is not a holder of a certificate of public convenience and necessity but rather is a private carrier holding several permits. After considering the written protest of C. B. Johnson and the written Motion to Strike said protest and the statements of counsel, the Examiner granted the Motion to Strike the written protest filed on behalf of C. B. Johnson, Inc., a private carrier."

So far as we have been able to determine, there are no Colorado Supreme Court decisions bearing directly on the question here raised. All counsel have called our attention to the recent holding of the Colorado Supreme Court in the case of Western Colorado Power Company, et al. vs. Public Utilities Commission (The Colorado-Ute Hayden Plant Case), 411 P. 2nd 785,

where the court apparently held that in an application for a certificate to construct a steam electric generation plant, the Commission should consider the electric service available from all sources, whether such sources were utilities or non-utilities. A persuasive argument can be made by analogy that under such holding, the Commission is required to consider all transportation service available in a common carrier proceeding, whether or not such service is available to the public. We do not believe, however, that the doctrine promulgated by the Colorado Supreme Court in the said case should be extended to apply in the motor carrier transportation area of regulation without a direct holding of the Colorado Supreme Court that it is so intended to apply. We therefore reject the contention of counsel for Protestants and Intervenors that the case of Western Colorado Power Company, et al. vs. Public Utilities Commission is applicable or controlling as to the issue before the Commission in the instant proceeding.

The fact, however, that the Commission has "consistently held over a period of many years that a private carrier by motor vehicle has no standing to protest either the granting of common carrier authority or even additional private carrier by motor vehicle authority" does not necessarily establish that the Commission was correct in so holding. It, therefore, becomes necessary to examine in some detail the legal basis for such ruling.

The statute, 1963 CRS 115-6-9, gives to "such persons as will be interested in or affected by any order that may be made by the

Commission in such proceeding" an absolute right to intervene, which right entitles them "to be heard, examine and cross-examine the witnesses, and introduce evidence."

This statute, on its face, would appear to give any consumer of a given utility service, an absolute right to intervene in a rate proceeding involving that utility. For example, the major telephone utility operating in the State of Colorado provides telephone service to over 600,000 users of telephone service. In a rate proceeding, the Commission customarily allows all consumers who may appear that may be affected by a rate increase to testify as public witnesses if they so desire. However, in a proceeding involving the determination of rates to be charged by such telephone utility, would each of the 600,000 telephone users be entitled to retain counsel and to intervene as a matter of right, and "be heard, examine and cross-examine the witnesses, and introduce evidence?" If so, proceedings before administrative agencies would be completely unworkable. Forunately, however, the courts have not so held. We now quote at length from the brief submitted by Applicants herein.

Beginning of Quotation. "Numerous courts interpreting statutes similar to the Colorado statute have recognized the fact a mere public interest in the subject matter in common with the general public is insufficient. The general rule is that the person must have a personal interest in the matter that subjects him to actual or threatened injury. For example, see N. E. Smith Lbr. Co. v. Alabama Public Service Commission, et al, 24 So. 2nd 409, where a

commercial user of electricity sought to intervene in a proceeding before the Alabama Public Service Commission dealing with the reduction of a power company's charges to residential and street lighting consumers. The party seeking intervention alleged that a refund to residential users would impair the ability of the power company to provide services. The statute by which intervention was sought read as follows:

> 'Every person, firm, corporation, co-partnership, association, or organization affected thereby may by petition intervene and become a party to any proceeding before the Commission.'

It was of course obvious that, as a user of electricity, the order would have some effect on this commercial user of electricity. In fact the order stated that the charges to inductrial users was being provided at the lowest average cost in the company's history and the credit should apply only to residential and street light consumers. The Commission finding no direct financial interest denied intervention. This denial of intervention was appealed to the Alabama Supreme Court. Upholding the Commission's denial of intervention, the Court had this to say about the statute allowing intervention in a commission proceeding if he is 'affected thereby':

> 'The words in the above-cited statute "affected thereby" are pertinent to the question here under consideration. This statute is but the expression of the general rule as expressed in numerous decisions. Illustrative is "the following from Poyner

v. Whidden 234 Ala. 168, 174 So. 507, 510: 'To entitle a party to invoke the court's jurisdiction to review the action of a subordinate court or body, by the writ of certiorari, he must show that he is a party to the proceeding or "that he has a personal interest in the subject-matter, and not a mere public interest, in common with the general public."'

In determining what was a sufficient interest, the Court cited the general principles set forth in Edward Hines Trustees v. United States, 263 U.S. 143, as follows:

'1. To maintain a suit to set aside an order of the Interstate Commerce Commission upon the ground that it exceeded the powers of the Commission, it is not essential that a plaintiff should have been a party to the proceedings before the Commission in which the order was made.

'2. But to maintain such a suit the plaintiff must show that the order alleged to be void subjects him to actual or threatened legal injury.'

The United States Supreme Court in Alleghaney Corp. v. Breswick & Co., 353 U.S. 151 (1957) had occasion to interpret the meaning of 'interested parties' as the terms appear in the Interstate Commerce Act. Appellees in this case had argued that under Sections 5(a)(b) and 17(3) of the Interstate Commerce Act, they were entitled to an evidentiary hearing in a merger-status order proceeding. The court first noted that section 5(2)(b) provides that -

'Whenever a transaction is proposed under subparagraph (a) . . . the Commission shall . . . afford reasonable opportunity for interested parties to be heard. . . . a public hearing shall be held in all cases where carriers by railroads are involved unless the commission determines that a public hearing is not necessary in the public interest . . . '

The Court then went on and stated -

'Section 17(3) provides in part, that "all hearings before the Commission, a division, individual Commissioner, or board shall be public upon the request of any party interested.'

The United States Supreme Court then held the following:

'We need not determine the bounds of the Commission's power to dispense with, or limit, hearings under section 5(2)(b), for appellees' claim of a right to a hearing in the merger-status order proceeding must fail for another reason--lack of the requisite interest of "interested parties."

'The reference in section 5 to "interested parties", like the reference in section 1(20) to "party in interest", must be interpreted in accordance with the rules relevant to standing to become parties in proceedings under the Interstate Commerce Act. A hearing under that Act is not like a legislative hearing and "interest" is not equivalent to "concern". It may not always be easy to apply in particular cases the usual formulation of the general principle governing such standing--e.g., "the complaint

must show that plaintiff has, or represents others having, a legal right or interest that will be injuriously affected by the order." Moffat Tunnel League v. United States, 289 U.S. 113, 119. (our emphasis)

From the above, as well as other cases, it is clear that the right to appear in Commission proceeding if a person is interested or will be affected by any order, as provided by C.R.S. 1963, 115-6-9, means a substantial legal interest or as it was elegantly stated in Pittsburgh & W. Va. Ry. Co. v. United States, supra.

'The essence of any litigant's qualifications to sue is his susceptibility to injury in a legally cognizable sense, which, stated another way, is simply the reality of his being aggrievated by the decree or party he challenges. The law provides no remedies for imagined detriment.'

As before stated, it is an absolute necessity that only persons with a legal direct interest have, as a matter of right, the right to appear and present evidence. The type of interest required by C.R.S. (1963), 115-6-9 is not a mere casual interest or even a pecuniary interest, but rather is a legally protected interest. For example, a commercial carrier might have a pecuniary interest in maintaining particular traffic which it handles for its owner-shipper. A receiving party, however, may support a for-hire carrier to obtain this same product, f.o.b. origin. Certainly the commercial carrier is not an interested party even though

said carrier would lose the traffic. The reason is, the commercial carrier has no legal right to protection. The same is true of a private carrier.

As the Commission knows, private carriers were not regulated under the original motor carrier act. We pose the hypothetical question, 'What were the rights of the private carrier to protest at that time?' We submit it was no right at all since their interest was not protected. The question then becomes, 'Did the enactment of the private carrier act elevate such carriers' status to that of a legally protected right against common carriers?' This must be answered in the negative, since the sole purpose of regulating private carriers was not to elevate their status, but to protect common carriers. See PUC v. Stanton Transportation Co., supra. The protective mantle intended by the legislature to protect the common carrier, cannot now become an instrument of destruction to those shielded public carriers.

The Commission itself has recognized that a mere member of the public has no right to appear and protest a proceeding before it, for Rule 7(a) of its General Rules of Practice provides:

> 'at any hearing, all parties named in the proceeding Rule who are directly affected by the proceeding, shall be entitled to enter an appearance, to introduce evidence, examine and cross-examine witnesses, make arguments, and generally participate in the conduct of the proceeding.' (our emphasis)

It thus being clear that only persons with legally protected interests have an absolute right to appear in Commission proceedings, we arrive at the critical question presented - that is, does a private carrier have a sufficient direct legal interest to be allowed to protest the transfer of a common carrier certificate?

In order to answer this question, it is necessary to take a brief look at the difference between a private carrier and a common carrier. We note initially that a private carrier is totally unlike a common carrier, in that such private carrier cannot lawfully provide service to the general public. At C.R.S. (1963), 115-11-3 the following is expressly provided:

> 'This article shall not apply to any motor vehicle carrier as defined by section 115-9-1, nor shall anything herein contained be construed or applied so as to compel a private carrier by motor vehicle to be or become a common carrier, or to subject such private carrier by motor vehicle to the laws or liability applicable to a common carrier.'

The distinction between a private carrier and a common carrier is confirmed in the landmark case of McKay v. Public Utilities Commission. 104 Colo. 402, 91 P. 2d 965, in which the Court stated:

> '. . . a private carrier is one who, without making it a vocation, or holding himself out to the public as ready to act for all who desire his services, undertakes, by special agreement in a particular instance only, to transport property

from one place to another either gratuitously or for hire.'

Thus, it is seen that a private carrier is totally devoid of any statutory legal obligation to provide service for any member of the shipping public, and, in fact, is specifically prohibited from holding out a service to the general public.

This holding out includes a holding out to any particular industry or segment of the shipping public. Again referring to the McKay case, it was there stated:

'Petitioner attempts to make out a case by testimony to the effect that he refused to accept certain shipments. This evidence is not convincing, and the commission was warranted in entirely disregarding it. Petitioner's theory seems to be that if a shipper agrees to be his customer and petitioner agrees to haul for the customer, regardless of volume or number of shippers, that constitutes being a private carrier. This is wholly fallacious. One of the express legislative intents in regulating private carriers was to prevent that kind of manipulation. To permit such private-carrier operation would successfully undermine all common-carrier activities. Being unable to show a public convenience and necessity, by obtaining a certificate as a common carrier, a private carrier, under the guise of such a permit, and without assuming any of the liabilities and responsibilities, would take all of the remunerative traffic from

the common carrier and leave the latter to accept what remained.'

This restriction upon a private carrier's activities was a confirmance of the earlier case of Davis v. Pueblo ex rel, Public Utilities Commission, 79 Colo. 642, 247 P. 801, in which case the carrier stated he was merely serving a particular shipper association. The Court in the Davis case stated:

'A service may effect "so considerable a fraction of the public that it is public in the same sense in which any other may be called so... The public does not mean everybody all the time." Id.

'Had the defendant made all save one of the shippers of freight in that territory, or all purchasers of postage at any post office therein, members of the association, and claimed that such limitation converted an otherwise public into a private carrier, the contention would be so absurd as to be instantly rejected. But the reasons for that rejection would be the identical reasons which demand rejection of defendant's contention, in the instant case: (a) The proportion of the public served is so large as to be the public; (b) the limitation is a mere device to hoodwink the law.'

Thus, since a private carrier cannot legally serve the public, it is obvious that a private carrier has no right to object to the grant of common carrier authority. The services that each perform are entirely separate and distinct and the public is entitled to common carrier service for, as it has often been

stated by the Interstate Commerce Commission, a contract carrier is not compelled to serve all shippers desiring to use its facility and a shipper is entitled to dependable motor-carrier service which is not subject to the contingency of negotiating a satisfactory agreement for contract carriage or the burden of assuming the obligations of such a relationship. See Quality Milk Service, Inc., Extension - Molasses, 64 M. C. C. 5, and J. M. Rayfield Contract Carrier Application, 21 M. C. C. 214. Based upon this lack of ability, coupled with the lack of legal obligation to provide a particular service, the Public Utilities Commission has consistently in the past refused to give any credence to protesting testimony given by a private carrier." End of Quotation.

We also now take official notice of Decisions No. 69292 and No. 69520, as relevant to the history of motor carrier intrastate transportation services.

We now adopt the above-quoted language as our own. It sets forth in clear detail the legal basis for the past rulings of the Commission and the ruling of the Commission in the instant proceeding. We now specifically hold:

1. A (contract) private carrier by motor vehicle may not intervene as a matter of right in an application before the Commission, made by another, seeking authority to operate as a private carrier by motor vehicle.

2. A (contract) private carrier by motor vehicle may not intervene as a matter of right in an application before the Commission, made by others, seeking authority to transfer private carrier by motor vehicle operating rights.

3. A (contract) private carrier by motor vehicle may not intervene as a matter of right in an application before the Commission, made by another, seeking authority to operate as a (common) motor vehicle carrier.

4. A (contract) private carrier by motor vehicle may not intervene as a matter of right in an application before the Commission, made by others, seeking authority to transfer (common) motor vehicle carrier operating rights.

5. In all of these proceedings, the Commission, in its discretion, may allow a (contract) private carrier by motor vehicle to intervene upon compliance with Rule 8 of the Rules of Practice and Procedure Before the Public Utilities Commission.

6. An association of (contract) private carriers by motor vehicle (Contract Carriers Conference of the Colorado Motor Carriers' Association) stands basically in the same position as its members and cannot intervene as a matter of right in the above-designated proceedings. The Commission, in its discretion, may allow such an association to intervene upon compliance with Rule 8 of the Rules of Practice and Procedure Before the Public Utilities Commission.

We now proceed to a determination of the preliminary matters referred to in the portion of our decision designated as Procedure and Record.

The Petition to Intervene filed by the Contract Carriers' Conference of the Colorado Motor Carriers' Association is denied. Such Conference is not entitled to intervene as a matter of right in a proceeding to transfer

(common) motor vehicle carrier operating rights. The Petition to Intervene does not set forth facts establishing "a substantial interest in the subject matter of the petition or any part thereof" (Rule 8-d). The Petition to Intervene, if granted, would unduly broaden the issues before the Commission. The Commission, in its discretion, therefore denies the Petition to Intervene.

The Motion To Strike the Protest and Intervention of Armored Motor Service is sustained for the same reasons stated in the preceeding paragraph dealing with the proposed intervention of the Contract Carriers Conference. It automatically follows that the motion to dismiss the application made by Armored Motors Service and Speedy Messenger at the conclusion of the case of the Applicants is denied as to Armored Motors Service. Such motion is also denied as to Speedy Messenger Service in that the case presented by the Applicants was and is adequate and sufficient to authorize the transfer of the certificate without diminution of authority thereunder.

The Motion to Strike the Appearances of the Continental bus system companies is denied. In our opinion, this motion to strike, at the time when made, was premature.

The second issue upon which the Presiding Commissioner requested briefs involved the jurisdiction of the Commission, at the time of transfer, to restrict a general commodity certificate against the transportation of specific commodities. We believe in the proper case that the Commission does have such jurisdiction. In the instant case, however, the

Commission has found as fact that the transferors (Perry Transfer Company) have been and now are engaged in bona fide motor carrier operations under the certificate sought to be transferred. In the case of United States et al v. Carolina Freight Carriers Corporation, 62 S. Ct. 722, 315 U.S. 475, the Supreme Court of the United States said:

> "On the other hand, if the applicant has carried a wide variety of general commodities, he cannot necessarily be denied the right to carry others of the same class merely because he never carried them before. And where he has carried a wide variety of general commodities, he cannot necessarily be restricted to those which he carried with more frequency and in greater quantities than the others . . . The Commission may not atomize his prior service, product by product, so as to restrict the scope of his operations, where there is substantial evidence in addition to his holding out that he was in 'bona fide operation' as a 'common carrier' of a large group of commodities or of a whole class or classes of property. There might be substantial evidence of such an undertaking though the evidence as to any one article was not substantial. The broad sweep of his prior service may indeed have made the carriage of any one commodity irregular and infrequent. Yet viewed as a whole rather than as a group of separate and unrelated items, his prior activities may satisfy the test of 'bona fide operation' as a 'common carrier' within the

> scope of his holding out. The fact that some of the articles may have been carried before but not after June 1, 1935, may of course indicate an abandonment of the prior undertaking . . . But it does not necessarily mean that they should be stricken from the certificate, since the natural and normal course of his business may reveal a continuous undertaking to transport any or all commodities embraced within the group or the class. That is to say, he may have been a common carrier of a large group of general commodities or of an entire class of property both before and after the critical date though the specific commodities carried varied considerably. The questions are whether his service within the territory in question was sufficiently regular and whether his coverage of commodities was sufficiently representative to support a finding that he was in 'bona fide operation' as a 'common carrier' of the group of commodities or of the class or classes of property during the periods in question."

It is true that the court was making an interpretation under the Federal Motor Carrier Act. We believe, however, the same logic should apply in the instant case. There are tens of thousands of specific items classified for transportation rate purposes under classification manuals used by this Commission. A given common carrier might haul some of these items on a daily basis, and on the other hand, might never haul some of the items. If this

Commission should attempt, on transfers, to restrict a common carrier certificate to the items actually hauled by the transferor in a given period, we would end up with a completely unworkable hodge-podge of authorities. Generally speaking, the Commission will not and should not, on transfer, impose commodity restrictions, where a bond fide motor carrier operation is being carried on by the transferor at the time of transfer. We have therefore determined that the certificate here in question should be transferred without restriction.

ORDER

THE COMMISSION ORDERS:

1. That John Joseph Perry and Paul K. Di Andrea, co-partners, doing business as "Perry Transfer Company", 2660 West 40th Avenue, Denver, Colorado, be, and hereby are, authorized to transfer all rights, title, and interest in and to PUC No. 3800 and PUC No. 3800-I to B.D.C. Corporation of Colorado, 420 Denver Club Building, Denver, Colorado, subject to encumbrances, if any, against said authority approved by this Commission.

2. That the Petition to Intervene filed herein by the Contract Carriers Conference of the Colorado Motor Carriers' Association, be, and the same hereby is, denied.

3. That the Motion to Strike the Protest and Intervention of Armored Motor Service made by the Applicants herein, be, and the same hereby is, sustained, and the Protest and Intervention of Armored Motor Service be, and the same hereby is, stricken.

4. That the Motion to Strike the appearance of the Continental bus system companies be, and the same hereby is, denied.

5. That the Motion to Dismiss the application made by Armored Motor Service and Speedy Messenger Service upon the completion of the case of Applicants, be, and the same hereby is, denied.

6. That said transfer shall become effective only if and when, but not before, said transferors and transferee, in writing, have advised the Commission that said certificates have been formally assigned and that said parties have accepted, and in the future will comply with, the conditions and requirements of this Order, to be by them, or either of them, kept and performed. Failure to file said written acceptance of the terms of this Order within thirty (30) days from the effective date of the Order shall automatically revoke the authority herein granted to make the transfer, without further Order on the part of the Commission, unless such time shall be extended by the Commission, upon proper application.

7. The tariff of rates, rules, and regulations of transferors shall, upon proper adoption notice, become and remain those of transferee until changed according to law and the rules and regulations of this Commission.

8. The right of transferee to operate under this Order shall depend upon the prior filing of the annual report by transferors herein, covering the operations under said certificates up to the time of transfer of said certificates.

9. That transfer of interstate operating rights herein authorized is subject to the

Federal Motor Carrier Act of 1935, as amended.

10. This Order shall become effective twenty-one days from date.

(S E A L)

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

HENRY E. ZARLENGO
HOWARD S. BJELLAND
EDWIN R. LUNDBORG
Commissioners

ATTEST: A TRUE COPY

Dated at Denver, Colorado, this 27th day of June, 1967.

ls

William D. Mitchell, Secretary

APPENDIX A-2

IN THE DISTRICT COURT
IN AND FOR THE
CITY AND COUNTY OF DENVER
STATE OF COLORADO
Civil Action No. CO1783

LEONARD DE LUE, D. J. SEBERN, T. W. RINKER, and TED P. RINKER d/b/a ARMORED MOTORS SERVICE; and THE CONTRACT CARRIERS CONFERENCE OF THE COLORADO MOTOR CARRIERS ASSOCIATION,	)	
Petitioners,	)	JUDGMENT
vs.	)	AND ORDER
THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; JOHN JOSEPH PERRY and PAUL K. DI ANDREA d/b/a PERRY TRANSFER COMPANY; and B. D. C. CORPORATION OF COLORADO,	)	OF COURT
Respondents.	)	

This matter coming on for review by the District Court on a Petition for Writ of Certiorari or Review filed by Petitioners, Leonard

De Lue, et al, and the Court having heard arguments of counsel and being fully advised of the premises, DOTH FIND THAT:

1. The Public Utilities Commission of the State of Colorado has regularly pursued its authority in this case.

2. Orders Nos. 69731, 69811 and 69851 of the Public Utilities Commission of the State of Colorado does not violate any right of the Petitioners either under the Constitution of the United States or the Constitution of the State of Colorado.

3. Decisions Nos. 69731, 69811 and 69851 of the Public Utilities Commission of the State of Colorado are just and reasonable and in accordance with the evidence presented to the Commission.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Decisions Nos. 69731, 69811 and 69851 of the Public Utilities Commission of the State of Colorado are hereby affirmed.

DONE at Denver, Colorado, this 5th day of June, 1968.

BY THE COURT:

John Brooks, Jr.
District Judge

APPENDIX A-3

NO. 23653

LEONARD DE LUE, D. J. SEBERN, T. W. RINKER and TED P. RINKER, d/b/a ARMORED MOTORS SERVICE and THE CONTRACT CARRIERS' CONFERENCE OF THE COLORADO MOTOR CARRIERS' ASSOCIATION,

Plaintiffs in Error,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; JOHN JOSEPH PERRY and PAUL K. DI ANDREA d/b/a PERRY TRANSFER COMPANY; and B.D.C. CORPORATION OF COLORADO,

Defendants in Error.

Error to the District Court
of the
City and County of Denver
Hon. John Brooks, Jr., Judge

EN BANC JUDGMENT AFFIRMED

Herbert M. Boyle,
Attorney for Plaintiffs in Error,
Leonard De Lue, D. B. Sebern, T. W. Rinker and Ted P. Rinker, d/b/a Armored Motors Service.

John J. Conway,
Attorney for Plaintiff in Error,
The Contract Carriers' Conference of the Colorado Motor Carriers' Association.

Duke W. Dunbar, Attorney General,
John P. Moore, Deputy Attorney General,
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The Public Utilities Commission of the State of Colorado.

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Attorneys for Defendants in Error,
John Joseph Perry and Paul K. Di Andrea d/b/a Perry Transfer Company and B. D. C. Corporation of Colorado.

Opinion by MR. JUSTICE DAY.

This case was commenced as a routine joint application before The Public Utilities Commission by Perry Transfer Company as seller and B. D. C. Corporation as buyer, seeking Commission approval of the sale and assignment of Perry's common carrier certificate of authority to haul general commodities.

In this writ of error not only is the P. U. C. decision to permit the transfer of the certificate challenged, but there is also presented the broad question whether a private carrier can as a matter of right and by entitlement as a matter of law intervene in a proceeding involving the transfer of a common carrier certificate.

The Commission ruled against the intervenors Armored Motors and Contract Carriers' Conference. The petition for intervention was denied and the Commission further ordered stricken from the proceedings the protests filed by the private carrier intervenors. They bring this writ of error to a district court judgment affirming the Commission decision. We will refer to them as intervenors or by name. The other parties will be designated as Perry, the Commission and B. D. C.

I.

Touching first on the correctness of the Commission decision allowing the sale and transfer of the certificate, we hold the Commission decision was correct and affirm the judgment of the trial court upholding it.

The issues on the application for transfer were very limited. They involved the right of

the applicant to sell its certificate which is by law deemed subject to transfer as any other property, although approval of the Commission is additionally required, and the fitness of the purchaser to succeed to the common carrier operation of the transferor.

In this case the Commission findings that the Perry Transfer Company was in good standing before the Commission and had been and was engaged in bona fide motor carrier operations under its operating rights is fully supported by the record. Additional findings were that B. D. C. was adequately financed and had additional financial resources at its command for adequate rendition of proper service under the certificate; that it intended to purchase additional equipment; that it would lease adequate office facilities, garage and parking facilities; and that its corporate officers and management personnel were experienced in the conduct of motor carrier general commodity transportation service and were fit and proper persons to conduct and manage the business. These findings as to fitness of the transferor also are supported by the evidence. These were the only material issues before the Commission. All other issues attempted to be raised by the intervenors were collateral and immaterial.

II.

The very content of the protest and proffered evidence of Armored's contract operations demonstrated the correctness of the Commission's ruling in denying the request to intervene and in striking the protests.

The statute concerning the matter of intervention in the P.U.C. proceeding is C.R.S. 1963, 115-6-9(1) which in pertinent part provides:

> "At the time fixed for any hearing before the commission, any commissioner, or an examiner, * * *, the applicant, petitioner, complainant, the person, firm, or corporation complained of, such persons, firms or corporations as the commission may allow to intervene, and such persons, firms, or corporations as will be interested in or affected by any order that may be made by the commission in such proceeding, shall be entitled to be heard, examine and cross-examine witnesses, and introduce evidence."

The statute contemplates two types of intervenors, (a) those which the Commission may permit to intervene, and (b) those who will be interested in or affected by any order that the Commission may make. In aid of and augmenting the statute the Commission, pursuant to the authority granted to it, can promulgate administrative rules of practice and procedure. Such rules relative to appearances by other than the parties have been adopted and published by the Commission. They read as follows:

> "Rule 7(a) Rights of Parties. At any hearing, all parties * * * who are directly affected by the proceeding, shall be entitled to enter an appearance, to introduce evidence, examine and cross-examine witnesses, make arguments, and generally participate in the conduct of the proceeding."
>
> "Rule 8(a) When Leave to Intervene Necessary. Persons not directly affected

by the proceeding shall secure an order from the Commission granting leave to intervene before being allowed to participate."

* * * * *

"Rule 8(d) When Petition May Be Granted. If an intervening petition shows substantial interest in the subject matter of the proceeding or any part thereof and does not unduly broaden the issues, the Commission or the hearing officer may grant the prayer for leave to intervene and thereupon the intervenor shall become a party to the proceeding with respect to the matters set out in his intervening petition and may be subject to such reasonable conditions as may be prescribed."

After the application for transfer was filed, Armored and Conference petitioned the Commission for leave to intervene, apparently addressing their request to the discretion of the Commission. The petitions upon the filing thereof were granted by the Commission and both Armored and representatives of Conference did participate in the hearing. However, after it became apparent to the Commission that Armored and Conference were not limiting themselves to the issues of the right of Perry to sell and the fitness of B. D. C. to purchase and to succeed to Perry's general hauling business, the Commission found that Armored had shown no substantial interest in the subject matter and that its intervention would unduly broaden the issues before the Commission. Conference had no interest except to attempt to establish as a general proposition

of law that any private carrier -- for which it was the spokesman -- could intervene as a matter of right in any common carrier proceeding.

Armored in this court takes the broader position that its intervention was not addressed to the discretion of the Commission but should be allowed as a matter of right contending it would be and now is directly affected by the order of the Commission.

In support of its position Armored contends that it has a Class B private carrier certificate authorizing it to transport coin, currency, valuable papers and other commodities normally transported by armored car throughout the entire state. It contends that B. D. C. is a wholly owned Colorado subsidiary of Bankers Dispatch Corporation with headquarters in Chicago, Illinois, and that because the parent corporation and other subsidiary companies are engaged in the business of transporting valuable commodities similar to Armored's operation, B. D. C. is likely to offer services in this field under the common carrier authority acquired from Perry. Thus, the only interest shown by Armored in the transfer and the only effect the Commission order and transfer would have upon Armored concerned the threat of competition if B. D. C. should use its general commodity authority to transport the same type of commodities as were being transported by Armored under its contract with various banking institutions in the city and state.

Under Colorado law a private carrier has no legal right to be protected from lawful competition from a common carrier. In fact, the

converse is true. Prior to 1931 private carriers were not regulated in this state. In that year the Private Carrier Act was enacted by the legislature, C.R.S. 1963, 115-11-1 et seq., as amended, authorizing the regulation of private carriers. This court has had occasion to review the propriety and legality of the regulation of private carriers in McKay v. Public Utilities Commission, 104 Colo. 402, 91 P.2d 965, wherein it was said:

> "The legislative intent is clear, that the authorization of private carriers shall not be detrimental, within the limits of the law, to common-carrier operation. No permit as a private carrier can be granted by the commission if in its opinion, based upon proper evidence, such private-carrier operation impairs the efficient public service of an authorized common carrier serving the same territory or over the same highways or routes. All this indicates an intent to coordinate motor transportation in such a way as to preserve common-carrier operation and to not impair the integrity of state regulation of common-carrier service." (Emphasis added.)
>
> * * * * *
>
> "A common carrier has the duty of giving adequate and sustained public service at reasonable rates, without discrimination. Any failure in that respect makes it civilly liable * * *. A common carrier is held to the highest degree of care. The purpose of the legislative intent to protect the integrity of regulatory power over

common carriers is therefore apparent. The exercise of regulatory power is primarily in the public interest. A greater degree of service is required from the common carrier; hence, the legislative direction that no permit to a private carrier should be granted if it impairs the efficient public service of an authorized common carrier."

In the recent case of Public Utilities Commission v. Stanton Transportation Co., 153 Colo. 372, 386 P.2d 590, this court stated: "The flavor of the entire Act is to protect common carrier operations."

In contradistinction to the common carrier, the private carrier provides service at its convenience and subject to the negotiation of a satisfactory agreement for its services. Its protection is the contract it makes with its customer. If the contract is breached it has a remedy therefore. If the contract expires and the customer does not desire to renew it, it has no legal right to the business. Since it has no obligation to serve the public, it is not entitled to protection from competition. If the public convenience and necessity shows a need for the common carrier service, it is the public policy of the state that the common carrier is entitled to authority to serve that need.

Armored's contention that the decision violates its constitutional rights not to be injured in its business operation is answered in Perkins v. Lukens Steel Co., 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108, wherein it was held that in the absence of statutory provisions reflecting a legislative purpose to protect

certain competitive interests, an economic injury which results from lawful competition cannot in and of itself confer standing on the injured business.

It follows that since Armored has no right to protection from competition by Perry or its successors in interest it has no legal interest or right which it can assert in a proceeding involving the transfer of a common carrier certificate. See San Miguel Power Association v. Public Service Commission, 4 Utah 2d 252, 292 P.2d 511.

III.

An additional string to Armored's bow is the contention that it was error not to enter an order, along with the approval of the transfer, limiting B. D. C.'s authority to the transportation service shown to be primarily provided by Perry. It was contended by Armored that Perry, since it acquired its certificate, had primarily transported refrigerators, stoves, ovens, television sets, washing machines, dryers and furniture of all varities, household goods and accessories, kitchen cabinets, air conditioners and numerous other items and that the transferee should be limited to like items and nothing more.

The Commission -- correctly in our opinion -- refused to fragmentize the general commodity certificate transferred. The evidence and the findings of the Commission which are supported by the record show that Perry has carried on the business of hauling a broad range of commodities and that it has accepted

all freight tendered to it within the scope of its operating authority and has participated in the general commodity tariffs. Generally speaking, the Commission should not on transfer impose commodity restrictions when a bona fide motor carrier operation is being carried on by the transferor at the time of the transfer. See U.S. v. Carolina Freight Carriers Corp., 315 U.S. 475, 62 S.Ct. 722, 86 L.Ed. 971. The evidence was that B.D.C. intended to continue without interruption the business Perry Company had been traditionally carrying on; that under its certificate it would accept and carry any and all commodities requested by the shipping public, whether large or small; and also, that it intended to purchase additional equipment to meet any additional business generated.

The judgment is affirmed.

MR. JUSTICE KELLEY not participating.

APPENDIX A-4

Clerk's Office
SUPREME COURT
State of Colorado
Denver, 80203
June 9, 1969 Case No. 23653
DeLue, et al
v.
The PUC, et al

Mr. John J. Conway,
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Denver, Colorado. 80202.

Mr. Herbert M. Boyle,
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The Honorable Duke W. Dunbar,
Attorney General,
Mr. John P. Moore,

Deputy Attorney General,
State Capitol,
Denver, Colorado. 80202.

Gentlemen:

The following proceedings were this day had in the above numbered and titled case:

The petition for rehearing was denied.

Remittitur issued.

Yours very truly,

RICHARD D. TURELLI,
Clerk.
By /s/ Florence Walsh
Deputy Clerk.

APPENDIX B-1

RULE 7
Appearances

(a) Rights of Parties. At any hearing, all parties named in the preceding Rule who are directly affected by the proceeding, shall be entitled to enter an appearance, to introduce evidence, examine and cross-examine witnesses, make arguments, and generally participate in the conduct of the proceeding.

* * * * *

RULE 9
Pleadings

(e) Protests. Any person who may be affected by the granting of a certificate or permit to an applicant shall have the right to file his written protest (in duplicate) to the granting of such certificate or permit, or, in the discretion of the Commission, be heard as a protestant without written pleadings.

APPENDIX B-2

3-16-3. Licenses--issuance, suspension or revocation, renewal.--(1) In any case in which application is made for a license required by law, the agency, with due regard for the rights and privileges of all interested persons, shall set and conduct the proceedings in accordance with this article unless otherwise required by law.

* * * * *

3-16-5. Judicial review.--* * *(3) Any person adversely affected or aggrieved by any such reviewable agency action shall have standing to seek judicial review thereof.

* * * * *

115-6-9. Hearings--orders--record--review. At the time fixed for any hearing before the commission, any commissioner, or an examiner, or at the time to which the same may have been continued, the applicant, petitioner, complainant, the person, firm, or corporation complained of, such persons, firms, or corporations as the commission may allow to intervene, and such persons, firms, or corporations as will be interested in or affected by any order that may be made by the commission in such proceeding, shall be entitled to be heard, examine and cross-examine witnesses, and introduce evidence. A full and complete record of all proceedings had before the commission, any commissioner, or an examiner in any formal hearing had, and all testimony, shall

be taken down by any reporter appointed by the commission, and all parties in interest shall be entitled to be heard in person or by attorney.

APPENDIX B-3

Section 25. Due process of law. --No person shall be deprived of life, liberty or property, without due process of law.

APPENDIX B-4

CONSTITUTION OF THE UNITED STATES

ARTICLE XIV

§ 1. Citizenship defined--privileges of citizens.--All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

UPREME COURT, U. S.

OCT 6 1969

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 562

LEONARD DE LUE, D. J. SEBERN, T. W. RINKER, and TED P. RINKER, d/b/a ARMORED MOTORS SERVICE; and THE CONTRACT CARRIERS CONFERENCE OF THE COLORADO MOTOR CARRIERS ASSOCIATION, **Petitioners,**

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; JOHN JOSEPH PERRY and PAUL K. DI ANDREA, d/b/a PERRY TRANSFER COMPANY; and B.D.C. CORPORATION OF COLORADO, **Respondents.**

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF OF RESPONDENT, THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 562

LEONARD DE LUE, D. J. SEBERN, T. W. RINKER, and TED P. RINKER, d/b/a ARMORED MOTORS SERVICE; and THE CONTRACT CARRIERS CONFERENCE OF THE COLORADO MOTOR CARRIERS ASSOCIATION, **Petitioners,**

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; JOHN JOSEPH PERRY and PAUL K. DI ANDREA, d/b/a PERRY TRANSFER COMPANY; and B.D.C. CORPORATION OF COLORADO, **Respondents.**

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF OF RESPONDENT, THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, IN OPPOSITION

OPINION BELOW

Set forth verbatim as Appendix A-3 to the Petition.

Jurisdiction

Petitioners state jurisdiction is conferred by 28 U.S.C., Section 1257(3), which Respondent challenges.

28 U.S.C. 1257(3) requires, as here pertinent, that the validity of state statute as being repugnant to the Federal Constitution must be drawn into question in the court below.

The question raised below is set forth in the Petition for Rehearing by (Petitioner) The Contract Carriers Conference before the Supreme Court of the State of Colorado (R. p. 67) as follows:

> 1. ... As was pointed out throughout the Briefs of Plaintiffs in Error, the right to appear is not only recognized by the Rules of Practice and Procedure of the Public Utilities Commission, but also by the Public Utilities Law of the State of Colorado, and is *guaranteed by* the due process clauses of the State and Federal Constitutions. For this issue concerning the right to appear to be termed "collateral and immaterial" the Court would have had to have overlooked or misapprehended the provisions of these Rules, Laws, and Constitutions. (Emphasis is not supplied.)

This is simply a question of statutory interpretation to determine whether a person engaged in private carriage may intervene *as a matter of right* in a proceeding before the Commission involving the transfer of a common carrier certificate.

The Supreme Court of Colorado answered this question in the negative basing its determination upon a thorough examination of the pertinent statute and specific application to the situation and position of Petitioners.

It is a well settled rule that this Court not only accepts, but is bound by the construction given state statutes by state courts and that such construction is not subject to review, even though the effect of such construction is to remove any repugnancy to the Federal Constitution. See, among others, *Quong Ham Wah Co. v. Industrial ACC. Commission of California*, 255 U.S. 445, 448 (1921); *Tampa Waterworks Co. v. Tampa*, 199 U.S. 241 (1905); *Price v.*

Illinois, 238 U.S. 446 (1915); *Aero Mayflower Transit Co. v. Board of R.R. Com'rs of State of Montana,* 332 U.S. 495 (1947); *Thornton v. Duffy,* 254 U.S. 361 (1920); and *Guaranty Trust Co. v. Blodgett,* 287 U.S. 509 (1932).

Petitioners now present an entirely new federal question for review by this Court, i.e.,

> "Can the Public Utilities Commission of the State of Colorado constitutionally deny motor vehicle carriers holding valid private (contract) carrier permits from the State of Colorado the right to appear and be heard with respect to the transfer of a common carrier certificate, which certificate directly conflicts with the authority held by such private carriers, where they would be affected by such transfer" (Petition, p. 3).

A party who has raised but one federal question in the state court cannot in the United States Supreme Court argue, in addition thereto, another not raised in the courts below. *Dewey v. City of Des Moines, Iowa,* 173 U.S. 193, 197, 198 (1899); *Keokuk & H. Bridge Co. v. Illinois,* 175 U.S. 626, 633-635 (1900); and *Wilson v. Cook,* 327 U.S. 474, 483 (1946).

From the foregoing, it is clear that Petitioners have failed to sustain their burden of showing that this Court has jurisdiction to review the question presented for review here. It is, therefore, respectfully requested that this Honorable Court dismiss this Petition for Writ of Certiorari on the basis of a lack of jurisdiction.

QUESTION PRESENTED

Whether the Petitioners have been deprived of their property without due process of law and denied equal pro-

tection of the laws by the Public Utilities Commission of the State of Colorado in denying their requests for intervention as a matter of right and by entitlement as a matter of law in a proceeding involving the transfer of motor common carrier operating rights.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are listed in the Petition.

STATEMENT OF CASE

The statement of the case presented by Petitioners in their Petition is substantially correct and will be adopted here as the statement of the chronological procedure of this action.

Respondent, The Public Utilities Commission of the State of Colorado (hereinafter referred to as "Commission"), will merely add a brief synopsis of the case as a supplement.

Perry Transfer Company filed an application with the Commission to transfer its motor vehicle common carrier certificate No. 3800 (& I) to B. D. C. Corporation of Colorado. The transfer contemplated and included only the exercise of common carriage under the terms of the certificate owned by the transferor, Perry. Petitioner, Armored Motors Service, a motor vehicle *contract* carrier holding no common carrier authority and Petitioner, The Contract Carriers Conference of the Colorado Motor Carriers Association holding neither contract nor common carrier operating authority attempted to intervene as

Protestants to the transfer. It should be noted that the aforesaid Conference was not a legal entity, but rather only a part of a non-profit Colorado corporation which did not appear as a party in the proceeding (R. p. 146).

In relating what they consider to be the question presented for review, Petitioners demonstrate the untenability of their position by necessarily relying on a boot-strap type of reasoning in order to show they have any basis at all for relief. At page 3 of the Petition, the question is presented as follows:

> "Can the Public Utilities Commission of the State of Colorado constitutionally deny motor vehicle carriers holding valid private (contract) carrier permits from the State of Colorado the right to appear and to be heard with respect to the transfer of a common carrier certificate, *which certificate directly conflicts with the authority held by such private carriers, where they would be affected by such transfer.*" (Emphasis supplied.)

Legal affect upon the private carriers in such proceeding is precisely what the case is all about and the Commission's finding in that regard is the basis for and underlies the ruling which Petitioners here contest.

ARGUMENT

If this Court should determine that it has jurisdiction to review the question presented, it is clear that the question so presented does not involve any special, important or unsettled issues that warrant review by this Court.

In seeking review of the action of the Colorado Supreme Court and the Colorado Public Utilities Commission

in refusing them the opportunity to participate in a particular proceeding, Petitioners allege that such action deprived them of property without due process of law and further deprived them of the equal protection of the law. (Petition, p. 11.)

Thus, in very broad terms they allege that they have been deprived of their rights as protected by Amendment XIV, Section 1, of the United States Constitution (Petition, p. 3). In so arguing their 14th Amendment rights they have completely neglected to set out in any detail or with any specificity how the action of the Colorado Court and Commission denies Petitioners of due process, be it procedural or substantive, nor do they set forth how and on what legal basis they are affected.

The Commission correctly concluded that neither a private carrier by motor vehicle nor an association of private carriers may intervene as a matter of right in applications before the Commission seeking to transfer (common) motor vehicle carrier operating rights.

The Commission held that the intervention of a private carrier as well as an association of private carriers in an application proceeding involving the transfer of common carrier operating rights is a matter of discretion and not of right (R. p. 246). Petitioners on the other hand argued that such intervention is not discretionary, but is a matter of right arising from the status of private carriers in Colorado.

The applicable statute providing for intervention in Commission hearings is 1963 CRS 115-6-9 (1), which reads in part as follows:

"At the time fixed for any hearing before the Com-

> mission, ... the applicant, petitioner, complainant, the person, firm, or corporation complained of, such person, firms, or corporations as the Commission may allow to intervene, and such persons as will be interested in or affected by any order that may be made by the Commission in such proceeding, shall be entitled to to be heard, examine and cross-examine the witnesses, and introduce evidence."

The statute clearly requires that intervenors of right be "interested in or affected by" any order that may be made by the Commission in such proceedings. The meaning of such statutory language in terms of the nature and extent of interest required has been the subject of numerous court interpretations including *Allegheny Corporation vs. Breswick and Co.*, 353 U.S. 151 (1957), wherein the United States Supreme Court had before it a question as to whether certain parties were entitled to an evidentiary hearing before the Interstate Commerce Commission under a statute which provided "and shall afford reasonable opportunity before interested parties to be heard." The Court held:

> "The reference in section 5 to 'interested parties,' like the reference in section 1 (20) to 'party in interest,' must be interpreted in accordance with the rules relevant to standing to become parties in proceedings under the Interstate Commerce Act. A hearing under that Act is not like a legislative hearing and 'interest' is not equivalent to 'concern.' It may not always be easy to apply in particular cases the usual formulation of the general principle governing such standings — e.g., 'the complaint must show that plaintiff has, or represents others having a legal right of interest that will be injuriously affected by the order.' *Moffat Tunnel League vs. United States*, 289 U.S. 113, 119. (353 U.S. at 173)"

In *M. W. Smith Lumber Co. vs. Alabama Public Service Commission,* 247 Ala. 318, 24 So. 2d 409 (1946), a statute similar to Colorado's provided:

> "Every person, firm, corporation, co-partnership, association, or organization affected thereby may by petition intervene and become a party to any proceeding before the Commission."

Under such statute, a commercial user of electricity was denied intervention in a proceeding before the Alabama Public Service Commission involving the reduction of a power company's charges to residential and street lighting customers. Equating the standing necessary to intervene in a commission proceeding with the standing required to appeal as recognized by most cases, the Supreme Court of Alabama upheld the denial of intervention and stated:

> "The words in the above-cited statute 'affected thereby' are pertinent to the question here under consideration. This statute is but the expression of the general rule as expressed in numerous decisions. Illustrative is the following from *Poyner vs. Whiddon,* 234 Ala. 168, 174 So. 507, 510; 'to entitle a party to invoke the court's jurisdiction to review the action of a subordinate court or body, by the writ of certiorari, he must show that he is a party to the proceeding or "that he has a personal interest in the subject matter, and not a mere public interest in common with the general public."' " (24 So. 2d at 411)

In determining what was a sufficient interest, the Alabama Court cited the general principles set forth in *Edward Hines Yellow Pine Trustees vs. United States,* 263 U.S. 143 (1923), as follows:

> "1. To maintain a suit to set aside an order of the

> Interstate Commerce Commission upon the ground that it exceeded the powers of the Commission, it is not essential that a plaintiff should have been a party to the proceedings before the Commission in which the order was made.
>
> "2. But to maintain such a suit, the plaintiff must show that the order alleged to be void subjects to him to actual or threatened legal injury." (24 So. 2d at 411)

With respect to the interest necessary to intervene as a matter of right, the Circuit Court of Appeals for the Fourth Circuit in *Radford Iron Co. vs. Appalachian Electric Power Co.*, 62 F. 2d 940 (1933), stated:

> "It is well settled that the only interest which will entitle a person to the right of intervention in a case is a legal interest as distinguished from interest of a general and indefinite character which do not give rise to definite legal rights."

It is clear from the authorities herein cited that the phraseology "interested in or affected by" contemplates a personal legal interest or right entitled to protection. Applying this to the issue now before this Court, it is necessary to examine the nature and status of private carriers in Colorado and the rights accorded them under Colorado Law.

Before 1931, only common carriers were regulated in Colorado. In that year legislation was enacted authorizing the regulation of private carriers. That and subsequent legislation treating private carriers was the subject of extensive review by the Supreme Court of Colorado in *McKay vs. Public Utilities Commission*, 104 Colo. 402, 91 P. 2d 965 (1939), wherein that Court concluded:

"The legislative intent is clear, that the authorization of private carriers shall not be detrimental, within the limits of the law, to common carrier operation. No permit as a private carrier can be granted by the Commission if in its opinion, based upon proper evidence, such private-carrier operation impairs the efficient public service of an authorized common carrier serving the same territory over the same highways or routes. All this indicates an intent to coordinate motor transportation in such a way as to preserve common-carrier operation and not to impair the integrity of state regulation of common-carrier service (104 Colo. at 413, 91 P. 2d at 970)."

Later in *Public Utilities Commission vs. Stanton Transportation Co.*, 153 Colo. 372, 386 P. 2d 590 (1963), the Colorado Court made the following statement concerning private carrier regulation:

"The flavor of the entire Act is to protect common carrier operations. (153 Colo. at 377, 386 P. 2d at 593) The legislature has expressly declared that the business of private carriers by motor vehicle is affected with a public interest, CRS 1953, 115-11-3. Private carriers are, therefore, public utilities by legislative mandate. *Their property is devoted to a public use to the extent that it cannot be used to engage in competition with common carriers in such a manner as would impair the efficient service of the latter.*" (153 Colo. at 378, 386 P. 2d at 594)" (Emphasis supplied)

Clearly then private carriers are regulated in Colorado for the purpose of protecting common carriers. Sound public policy underlies this protection since the common carrier is the only type of carrier legally obligated to pro-

vide adequate service at reasonable rates to the public. As was explained in the *McKay* case, *supra*:

> "That this is in the public interest cannot be questioned, especially when we have in mind the difference in legal obligations as applied to common carriers and private carriers. The obligations of a common carrier to the public are different. A common carrier has the duty of giving adequate and sustained public service at reasonable rates, without discrimination. Any failure in that respect makes it civilly liable. Liability as to loss and damage owing to negligence is of a higher degree than that of a private carrier. A private carrier is liable for mere negligence. A common carrier is held to the highest degree of care. The purpose of the legislative intent to protect the integrity of regulatory power over common carriers is therefore apparent. The exercise of regulatory power is primarily in the public interest. A greater degree of service is required of the common carrier. Hence, the legislative direction that no permit to a private carrier should be granted if it impairs the efficient public service of an authorized common carrier." (104 Colo. 413, 91 P. 2d 970-971)

As distinguished from the common carrier, the private carrier provides service at its convenience and subject to negotiation of satisfactory agreements with members of the shipping public. This was discussed by the Colorado Court in the *McKay* case, *supra,* as follows:

> "... a private carrier is one who, without making it a vocation, or holding himself out to the public as ready to act for all who desire his services, undertakes, by special agreement in a particular instance only, to transport property from one place to another either

gratuitously or for hire. He carries only for persons with whom he has an initial contract and assumes no obligation to carry for others." (104 Colo. 415-416, 91 P. 2d 971-972)

Petitioners by the very nature of their status as private carriers have chosen to avoid any obligation to serve the public and the intervention of one who avoids the obligation to serve the public is discretionary with the Commission and not a matter of right. A case in point is *San Miguel Power Association vs. Public Service Commission*, 4 Utah 2d 252, 292 P.2d 511 (1956). In that case an electric cooperative filed a complaint and protest to an application for a certificate of convenience and necessity, seeking authority to extend power lines into an area served by the cooperative. The applicant moved to strike the complaint and protest and the Utah Commission granted this motion and refused to allow the cooperative to intervene in the hearing, present evidence, or cross examine witnesses. The cooperative appealed to the Supreme Court of Utah arguing that it had a right to intervene in the hearing. Under Utah Law, a public utility is one which performs service for the public generally, the same as a common carrier in Colorado. The cooperative on the other hand was not required to serve the public generally, thereby making its operation similar to that of a private carrier in Colorado. Affirming the Utah Commission, the Supreme Court of Utah held:

> "Since plaintiffs cannot legally be required to serve the public generally, they are not public utilities and the Commission correctly so decided.
>
> "From what we have said, we do not wish to infer that the Commission may arbitrarily and capriciously refuse to acquaint itself with all facts necessary to

make a decision. Whether the public convenience requires the granting of a certificate of convenience and necessity to an applicant and whether it would be an uneconomical duplication of facilities to render such services.

"In this case, it appears the Commission was fully conversant with the pertinent facts. *Whether plaintiffs should have been allowed the right of cross-examination was within the discretion of the Commission.* Had the Commission desired such aid from plaintiffs it could have allowed them to present evidence and to cross-examine witnesses, but since plaintiffs are not public utilities, the Commission was not required to allow them to intervene." (292 P. 2d at 512) (Emphasis supplied.)

The fact that the Commission must acquaint itself with all existing services does not require that all such services have the right to intervene and to present evidence and cross examine witnesses. The Commission must have sufficient discretionary powers to prevent its proceeding from becoming encumbered.

There is at least an intimation in the Petition that the operations of Petitioners as private carriers are competitive with that of common carriers in Colorado. Whether or not they are is not determinative and has no bearing on the issue of their standing before the Commission. The United States Supreme Court has repeatedly held that in the absence of statutory provisions reflecting a legislative purpose to protect the competitive interest, economic injury which results from lawful competition cannot in and of itself confer standing on the injured business. See *Alabama Power Co. vs. Ickes,* 302 US 464 (1938); *Tennessee Power Co. vs. TVA,* 306 U.S. 118 (1939); and *Perkins vs.*

Lukens Steel Co., 310 U.S. 113 (1940). As pointed out earlier, the private carrier in Colorado possesses no statutory right to protection from competition.

In summary, since under Colorado Law, private carriers are not entitled to protection from competition, their intervention in Commission proceedings is discretionary and not a matter of right. Accordingly, the Colorado Supreme Court and the Commission correctly concluded that neither a private carrier by motor vehicle nor an association of private carriers may intervene as a matter of right in an application before the Commission seeking authority to transfer (common) motor vehicle carrier operating rights.

Petitioners have not shown any legal interest or right which they can assert in a proceeding involving the transfer of a common carrier certificate. Neither have they shown how they would be legally affected by such proceeding. Petitioners have, therefore, completely failed to present a meritorious and substantial federal question that warrants review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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